

¹ R.H. Trans. at 40.

Claimant appeals and argues he proved he had just cause for failure to give respondent notice of accident within ten days after the accident. Thus, claimant requests the Board to reverse the ALJ's Award and remand the case back to the ALJ for determination of the other unresolved issues.

Conversely, respondent requests the Board to affirm the Award. Respondent argues the claim is barred because claimant failed to give timely notice to the respondent of his work-related accident. Respondent also argues claimant failed to establish just cause to extend the notice period from ten days to 75 days.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the Award should be affirmed. The Board agrees with the ALJ's analysis of the evidence and his findings and conclusions. It is, therefore, not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own as if fully set forth herein.

Claimant had a history of previous work-related low back injuries. He injured his back while he was working for the Santa Fe Railroad in 1975. That industrial accident resulted in claimant undergoing a L5-S1 fusion. Claimant injured his low back again while working for Stevenson Sheet Metal Company in 1990. That injury required only conservative treatment but was serious as claimant was off work for two or three years. During that period, claimant attended technical college and obtained training in electronics.

Claimant started working for respondent in 1995 as an electronic repair technician. On May 10, 1996, claimant tripped over some boxes as he was carrying a printer to his work station and fell, hitting his shoulder on metal shelving. Claimant was able to finish that work day which was on a Friday. But over the weekend his low back and lower extremities became symptomatic and those symptoms progressively worsened.

Claimant, however, was able to return to work on May 13, 1996. Claimant told a co-worker, Tom Anneler, that he hurt his back at work on Friday, May 10, 1996. Mr. Anneler suggested that claimant go see a R. Magee, M.D., because Dr. Magee had treated him for an injured knee and he was satisfied with the treatment.

Claimant made an appointment with Dr. Magee for Tuesday, May 14, 1996. On May 13, 1996, claimant also asked his supervisor, Robert L. Carson, Jr., for time off to see a doctor on May 14, 1996. Claimant admits he did not notify Mr. Carson at that time he was going to the doctor because of a work-related accident. Claimant also admitted he

knew on May 13, 1996, that he had injured his back as a result of a fall at work on May 10, 1996.²

Claimant was seen in Dr. Magee's office on May 14, 1996, not by Dr. Magee, but by his physician assistant Loretta Hoerman. Ms. Hoerman noted in the medical record of May 14, 1996, "This is not WC."³ But claimant testified he told Ms. Hoerman that he fell at work and that this was a workers compensation claim. Ms. Hoerman referred claimant for an MRI examination.

The MRI examination took place on May 23, 1996. Claimant testified he was then notified of the results of the examination either on May 27 or May 28, 1996. The MRI examination that showed claimant had a comminuted fracture at the L5 vertebral body which was a new finding and not the result of his previous low back injuries and treatment.

Claimant testified he did not realize until he was notified of the results of the MRI examination he had suffered a new injury during his fall on May 10, 1996. Claimant then told his union steward about the accident and along with the steward notified his supervisor of the accident. But that notification did not take place until May 29, 1996, the thirteenth day following claimant's May 10, 1996, accident not counting intervening Saturdays and Sundays.⁴

Respondent established through the testimony of claimant's supervisor, Mr. Carver, that at the time of claimant's May 10, 1996, accident respondent as required by the Division of Workers Compensation, had posted on the bulletin board found in respondent's break room the notice instructing workers to notify their employer immediately after a work-related accident. The notice specifically provides that failure to notify the employer within 10 days of the accident may result in the claim being denied.

Also, Mr. Carver established that all respondent's new employees are supplied with an employee handbook. Included in the handbook, are the following instructions to new employees, "Immediately report all injuries to your supervisor and the site administrator."⁵

In regard to the notice issue, the record contains the testimony of claimant, his co-worker, Tom Anneler, his supervisor, Robert L. Carver, Jr., respondent's site administrator Ann J. Bush and physician assistant Loretta Hoerman.

² R. H. at 20.

³ Hoerman Depo., Ex. 2.

⁴ *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, Syl. ¶ 2, 986 P.2d 373 (1999).

⁵ Carver Depo. at 37.

K.S.A. 44-520 squarely places on the injured worker the requirement to give the employer within 10 days, after the date of accident, notice of the accident or his claim shall not be maintainable under the Workers Compensation Act. But the Workers Compensation Act also provides that the time for giving notice is extended from 10 days to 75 days, if the worker shows just cause for not giving the employer notice within the initial 10 days after the accident.

Here, the Board finds the first day claimant gave respondent notice of the May 10, 1996, accident was on May 29, 1996. As previously noted, the 10 day notice period, is computed by not counting intervening Saturdays and Sundays. Thus, claimant gave notice outside of the 10 day requirement.

Claimant, however, argues he had just cause for not giving the 10 day notice. Claimant's just cause argument is that he did not realize that he had injured his back at work on May 10, 1996, until he was notified on either May 27 or 28, 1996, of the results of his May 23, 1996, MRI examination.

The Board, however, concludes, as did the ALJ, that claimant's just cause argument fails. Claimant admitted and claimant's co-worker Tom Anneler verified that as early as Monday, May 13, 1996, only three days after his accident at work, claimant realized his pain and discomfort in his lower back and legs was the result of the Friday, May 10, 1996, accident. Although claimant never admitted during his testimony that he knew he had to report a work-related accident within 10 days thereof, the Board finds the record establishes claimant, at least, should have known that requirement. Claimant had experienced a previous workers compensation accident and had made a claim for the accident in the state of Kansas. Claimant was supplied with information from respondent to report work-related accidents to his supervisor immediately through respondent's employee handbook. Respondent also had posted, as required, a notice that notified its employees to immediately notify the employer of a work-related accident and if notice was not given within 10 days their claim may be denied. The Board finds, for those foregoing reasons, that claimant's just cause argument fails.

All remaining issues are rendered moot because this claim is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's July 10, 2001, Award, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey W. Jones, Attorney for Claimant
 Gregory J. Worth, Attorney for Respondent
 Brad E. Avery, Administrative Law Judge
 Director, Division of Workers Compensation